SERVED: September 10, 1992

NTSB Order No. EA-3672

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of August, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. REECE S. SAUNDERS, Respondent.	)	Docket SE-10104 SE-10585

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr., on March 22, 1990, following an evidentiary hearing.[1] We grant the appeal in part.[2]

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]It appears from the appeal brief itself that respondent, who had counsel at the hearing, is now representing himself in this matter.

The law judge affirmed in its entirety an order of the Administrator revoking respondent's airline transport pilot certificate (ATP) and his first-class airman medical certificate. Revocation of the ATP was based, in part, on certain operational violations that allegedly occurred in connection with the May 9, 1987 Arrow Air Flight 254 piloted by respondent. The aircraft, a Douglas DC-8-63 transporting horses and horse handlers, departed Auckland, New Zealand for Brisbane, Australia. The flight diverted to its alternate landing site at Sydney, after respondent executed a missed approach at Brisbane. Respondent ultimately landed the aircraft at Williamstown Air Force Base, near Sydney. In connection with these events, respondent was charged with violations of Federal Aviation Regulation sections 121.537(f), 121.597(b), and 121.645(b) ("FAR," 14 C.F.R. Part 121).[3]

The Administrator's order also sought revocation under 14 C.F.R. 61.151(b),[4] based on respondent's Florida conviction on one count of "indecent exposure."[5] This conviction was the basis for the Administrator's claim that respondent lacked the "good moral character" required of holders of an ATP.

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[3]These rules are reproduced in the appendix.

[4]At the hearing, the Administrator was permitted to amend the complaint to correct a typographical error in this citation. Other corrections to certain figures in the complaint were also authorized.

[5]This phrase is not used in the statute. See discussion, infra.

Finally, the sought revocation of respondent's medical certificate was apparently premised on respondent's alleged falsification of his February 23, 1987 medical application.[6] In that application, ¶ 21w, respondent had indicated that he had no "other convictions." In light of the Florida action, the Administrator claimed that this written statement was either fraudulent or intentionally false, in violation of § 67.20(a)(1).[7]

With regard to the Australian flight, the law judge found the following events and facts. The flight release authorized a payload of 72,971 lbs. The actual payload was 77,427 lbs. Respondent was aware of the increase in payload, and did not receive authorization from Arrow Air for it. The flight release therefore understated the actual payload.

The law judge found that the increase in payload resulted in higher fuel consumption. At the time of takeoff, there was insufficient fuel to comply with § 121.645(b).[8] The judge also

[6]The Administrator's order did not connect revocation of respondent's medical certificate to a particular act or omission on respondent's part, nor was such a connection made at the hearing.

[7]This section, and § 61.151(b), are also reproduced in the appendix.

[8]I.e., to fly to and land at Brisbane and then to fly for a period of 10% of the total time required to fly from Auckland and land at Brisbane, after that to fly to and land at the most distant alternate airport specified in the flight release (apparently Sydney), and after that to fly for 30 minutes at holding speed at 1,500 feet above the Sydney airport, under standard temperature conditions.

found that, at Brisbane, the aircraft had approximately 18,000 lbs. of fuel, and the minimum needed at that time to divert to the alternate airport (Sydney) was 20,923 lbs.[9]

The law judge further found that respondent chose not to land at Brisbane, although a safe landing could have been executed there using 50 degree flaps. With insufficient fuel to reach Sydney, the law judge continued, respondent diverted to and landed at the Williamstown Air Force Base.

The law judge concluded that respondent was careless and, therefore, violated § 121.537(f) by beginning the flight without sufficient fuel due to the added payload, taking off without a proper flight release reflecting that payload, and "attempting to fly to Sydney rather than land at Brisbane" when he had insufficient fuel to complete a safe flight to Sydney. A violation of § 121.597(b) was also found, based on the payload understatement on the flight release. And, § 121.645(d) was found to have been violated by taking off with less fuel than the minimum required by that rule.

Turning to the second count of the complaint, the law judge noted respondent's conviction on February 18, 1987. The judge concluded that respondent had violated § 67.21[10] by making a false

[9]The initial decision reads 29,923, rather than 20,923. See Tr. at 434.

[10]This also appears to be a transcription error. Section 67.21 contains no prohibitions; it is only a statement of applicability. Later in the decision, the law judge uses § 67.20(a)(1), the correct citation.

statement. He did not, however, hold that, when respondent falsely answered item 21w of the medical application in the negative, he did so intentionally. The law judge affirmed the Administrator's allegation that respondent lacks the good moral character required by § 61.151(b) to hold ATP privileges, and that he lacks the qualifications to hold any kind of airman pilot certificate.[11]

Respondent, on appeal, claims that the evidence does not support the findings that he violated Part 121 subsections 537(f), 645(b) and 597(b).[12] As to the falsification finding, he notes that the law judge did not hold that he intentionally falsified the application. We address this issue first.

The only possible basis for revocation of respondent's medical certificate is the charge that he violated § 67.20(a)(1). That section requires finding that respondent's answer on the medical application was either fraudulent or intentionally false.

[11]The law judge made no specific finding regarding respondent's medical certificate. In light of our conclusion, we need not address the import, if any, of this omission.

[12]Respondent suggests that he was prejudiced when a witness he subpoenaed -- the loadmaster, Mr. McLaughlin -- failed to appear. There is no indication in the transcript, however, that respondent sought a continuance on this basis or raised this matter in any fashion before the law judge. We must, therefore, find that this claim has been waived. We also note that, by letter dated March 21, 1990, Mr. McLaughlin indicated receipt that day of the request to appear, which was dated March 19th, for a hearing on March 22, 1990. He stated his willingness to appear if he had been given more time to arrange his schedule and if compensation were provided. His failure to appear was, at least in part, caused by respondent's tardy request.

Although the law judge found neither, and actually stated "that it was a false statement, perhaps not intentionally false, but nevertheless false" (emphasis added), he upheld the violation. As a matter of law, such a result cannot stand.

The Administrator replies that, despite the law judge's statement, we should not treat it as a finding of lack of intent, and argues there is other circumstantial evidence in the record to support the charge. The Administrator notes that respondent was convicted of the offense only 5 days before he filled out the application, and questions how he could have forgotten so quickly.

We cannot agree with the Administrator's approach. The question of respondent's intent raises credibility questions. Resolution of these issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there. Respondent testified regarding the difficult circumstances he faced at the time he was completing the application, and the rote nature of the application.[13] The law judge obviously took this testimony into account in his ruling. We are unwilling to find that respondent's explanation was inherently incredible, so as to warrant overturning the law judge's finding. Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir.

[13]Respondent also noted that he wrote the FAA and told them of his error. Tr. at 367.

1988). The law judge was able to observe respondent, and was in a better position than this Board to determine intent.[14]

Accordingly, the law judge's finding that respondent violated § 67.20(a)(1) cannot be sustained. As that claim supported the Administrator's revocation of respondent's medical certificate, the revocation order (to the extent it was directed to that certificate) is reversed.

We next turn to the substance of the conviction and whether it supports a finding that respondent lacks good moral character. If so, revocation of respondent's ATP is an appropriate sanction. If not, the question arises whether the remaining charges related to the Australian flight are sufficient to warrant ATP revocation.

Administrator v. Roe, 45 C.A.B. 969 (1966), contains a detailed discussion of the "good moral character" standard. The CAB there said:

> We find that the Administrator had ample grounds for revoking respondent's air transport rating. The record establishes a pattern of conduct which departs from ordinary patterns of morality and shows that respondent is capable of

[14]The Administrator also suggests that the judge did not mean to imply that respondent lacked the intent to falsify the document. We disagree. While the law judge's finding may not, in context, be entirely clear, we think it sufficiently establishes that he was unwilling to find the necessary intent.

> The difficulties created by the law judge's failure to make a more direct finding are obvious. Intent is difficult to determine. Nevertheless, it is incumbent on our law judges to make the findings of fact necessary to determine whether a FAR has been violated.

> acting without inhibition in an unstable manner and without regard to the rights of others. . . . [H]is conduct was vindictive and entirely self-motivated. The publication of the photographs destroyed a marriage, subjected [two other persons] to extreme humiliation, and resulted in an attempted suicide by [one of them]. Such action indicates a significant character deficiency and a complete disregard for the rights of other human beings. . . .[T]he moral character traits disclosed in this record provide us with no reasonable assurance that these character deficiencies will not result in future behavior inimical to safety in air transportation.

Id. at 972.

Here, in contrast, respondent was convicted of one count of indecent exposure, under a statute that encompasses both exposure "in a public place or on the private premises of another, or so near thereto as to be seen from such private premises." 800.03 Florida Statutes; emphasis added. There is no indication that this was other than a first offense. Respondent was directed to perform community service, and was placed on 1 year's probation, in lieu of incarceration or fine. The only inkling in the record of the circumstances of the offense is the direction, in the judge's order (see Exhibit A-5), not to go to a specified address. This suggests that the incident occurred on private property.

The Administrator has the burden of proving his case, and must do so by a preponderance of the evidence. He has offered absolutely no information concerning the incident, perhaps believing that, on its face, it establishes a lack of good moral character. We cannot find that, as a matter of law, what has been presented to us by way of evidence is adequate to find lack

of good moral character so as to require revocation of respondent's ATP. The proof does not rise near the level discussed in Roe. While it may well be that, should the circumstances be known, they would support the finding sought by the Administrator, we cannot find on the evidence before us, as Roe dictates, that respondent has complete disregard for the rights of other human beings. Nor can we find on this record (as we did in Roe) that respondent has such character deficiencies that he represents a threat to safety in air transportation.[15] Accordingly, we find that the Administrator has not met his burden of proving that respondent does not meet the good moral character requirement of § 61.151.

The remaining counts in the complaint relate to the May 9, 1987 flight. We must decide two questions: 1) whether the law judge's decision finding that respondent violated subsections 597(b), 645(b), and 537(f) of Part 121 is supported by the

[15]We recognize that there is some evidence in the record to suggest that respondent's cockpit resource management skills warranted improvement, suggesting perhaps that his interpersonal skills were lacking. See, e.g., Tr. at 155. However, the Administrator did not develop this matter, and the record indicates that respondent had received training in this area. These slight references in the record are inadequate to substantiate a finding that respondent lacks good moral character.

We also note that the Administrator sought to introduce other character testimony. The law judge initially sustained respondent's objection, but later indicated some ambivalence ("we could dismiss the police officer. That determination, of course, ultimately is yours."). Tr. at 284-292. The Administrator neither sought to introduce that testimony later in the proceeding, nor appealed the judge's ruling.

evidence; and 2) what the appropriate sanction should be, in view of our substantive conclusions on this as well as the other count in the complaint.

As to the first question, the law judge's subsection 597(b) finding is affirmed. There was no disagreement that the authorized payload for the flight was 72,971 lbs. See Exhibit A-1. Exhibit A-2 (the "Load Sheet," containing payload and fuel weights, among other things) indicated that the total load was 77,427 lbs. The law judge found that respondent signed the flight release but, in understating the payload, failed to set forth the conditions under which the flight would be conducted.

Respondent attempted to explain that the 77,427-lb. figure was not final and not accurate, but was a "trial weight and balance." Tr. at 304-305. He testified that, after the Exhibit A-2 computations were made, horses, handlers, and spare parts were removed from the aircraft, lowering the payload to approximately 71,800 lbs., which is below the authorized level. Tr. at 304 and Exhibits R-3 and R-5.[16] Allegedly, Mr. McLaughlin was to revise the Load Sheet to reflect these changes.

In making his findings of fact related to this charge, the law judge was required to weigh the conflicting evidence,

[16]Exhibit R-3 is a telex supporting respondent's statement that equipment was off-loaded. Exhibit R-5 is a note from Mr. McLaughlin, advising respondent that "the shipper did not ship all the horses; so minus 1 horse & 2 [illegible, the Administrator suggests 'weanlings']. Also 3 less grooms." We disagree with the Administrator's statement (Reply at 20) that these exhibits are unreliable.

necessitating a credibility analysis. If the law judge believed respondent's explanation (which does have some documentary support), he would not have reached the conclusion he did.

As discussed earlier, whether we agree with the law judge's conclusion based on our review of the evidence is not the standard we apply on appeal. If we are to reverse a law judge's decision that is founded in a credibility analysis, we must be able to conclude that his finding is arbitrary or capricious (or, using other terminology, inherently incredible). Smith and Chirino, supra. We are unable to make such a finding here.

Respondent's appeal does, however, convince us that the law judge erred in finding a violation of § 121.645(b). The law judge relied on anecdotal testimony, whereas the documentary evidence raises sufficient doubt as to the Administrator's allegations that it cannot be said that the Administrator has proven his case by a preponderance of the evidence.

A key focus of the complaint was the allegation that, choosing not to land at Brisbane, respondent had left himself with fuel insufficient to comply with subsection 645(b). The parties appear to agree, and the law judge found, that the minimum fuel required to divert at Brisbane was 20,923 lbs. The law judge also found that the aircraft had only approximately 18,000 lbs. of fuel "upon reaching Brisbane." Tr. at 434.

The Administrator's claim that respondent thus left himself with 18,000 lbs. of fuel, approximately 3,000 lbs. short at this

point, was supported by the testimony of the first officer (Taylor) and flight engineer (Spillers), who used the 18,000-lb. figure. Taylor, however, was not certain exactly where that reading was taken between the time of the descent to Brisbane and the end of the climb out after the missed approach. Spillers testified that the aircraft had 18,000 lbs. of fuel after the missed approach, clearly indicating that it had considerably more at the critical time. See Tr. at 162-163.[17]

Using the flight plan, and tracking the projected and actual fuel use, respondent also testified that the aircraft had to have had approximately 18,000 lbs. of fuel at the descent into Brisbane (and, therefore, had more fuel than that "upon reaching Brisbane.")[18] This is consistent with Spillers' testimony and follows from the flight plan exhibit. This Exhibit R-1 shows that, at various points in the flight, potential and actual fuel use were relatively close. Even while the unexpectedly heavier winds were adversely affecting fuel consumption, at fuel check

[17]That respondent may have told Brisbane departure control at some point after the missed approach that the aircraft had 21,000 lbs. of fuel when, according to Spillers, it had 18,000 (Tr. at 162-3) does not assist our inquiry. Moreover, at the time, the aircraft was ascending, and Spillers acknowledged that he calculated the fuel at 18,000 lbs. after respondent answered departure control. This took some time. It is quite possible that, at the time respondent said there was 21,000 lbs., the remaining fuel was quite close to that amount.

[18]We note that the Administrator's exhibit of the flight plan (A-1) lacks information contained in respondent's flight plan exhibit (R-1). The information omitted is important to respondent's argument.

points the difference was never more than 1,900 lbs. Fuel economy then improved. At the top of the climb after the missed Brisbane approach, there were 10,900 lbs., when the projected amount was 11,300 -- a difference of only 400 lbs. after usage of 55,500 lbs.

These data would support a conclusion that, in the Brisbane vicinity, the actual fuel use -- rather than being 3,000 lbs. greater than projected -- was very close to what had been projected as necessary to comply with section 121.645(b). This substantially undermines the Administrator's position and the law judge's finding.

This review of the data also undermines the Administrator's contention and the law judge's finding that, at takeoff, there was inadequate fuel for the increased payload. Although we have declined to disturb the law judge's finding that respondent took off with a heavier load than was authorized, for at least two reasons that fact by itself does not prove that, at takeoff, section 121.645(b) was violated.

First, the Administrator offered no testimony to show <u>how much more</u> fuel would be needed. The only testimony on this point is that of respondent. Tr. at 315 (if payload was 77,000, the difference in fuel would be only 137 lbs.). Whether this minimal (in this context) difference would warrant a finding that this section was violated is problematic.

Second, respondent landed at Williamstown with 5,800 lbs. of

fuel.[19] The flight plan (which incorporates the fuel amounts needed to comply with the rule) had projected that, at the Sydney alternate landing site, the aircraft would land with 5,700 lbs. It would appear that, given this information, the applicable burden of proof would prevent us from concluding that, at takeoff, respondent was in violation of subsection 645(b).

The Administrator, however, contends that landing at Williamstown with 5,800 lbs. of fuel proves, rather than disproves, that respondent violated the subsection. We are not convinced.

The Administrator must prove a violation of subsection 645(b) by a preponderance of the evidence. Yet, we have found that no violation has been proven either at takeoff or at Brisbane, and the Administrator offered absolutely no evidence to prove that the fuel respondent had available on approach to Sydney did not meet the requirements of the regulation.[20]

Moreover, the answer is not obvious from the facts available to us. It would not have been impossible to complete the necessary maneuvering with 5,800 lbs. of fuel. Whether respondent could or could not accomplish this with the available

[19]Exhibit R-1 and Tr. at 167. Williamstown is 75 miles from Sydney. At the time the aircraft diverted, respondent was approximately 40 miles outside Sydney. Tr. at 312.

[20]The testimony (Tr. at 113, 176-177) that respondent advised Sydney that the aircraft was in the low minimum fuel status, that holding at Sydney would have been required, or that more fuel should have been loaded initially does not prove a violation of subsection 645(b).

fuel cannot be resolved on this record. In sum, the Administrator simply has not introduced the evidence necessary given the circumstances, and we are compelled to reverse the law judge's conclusion as being unsupported by a preponderance of the evidence.

Finally, related to the subsection 537(f) violation is the law judge's finding that respondent was careless because he should have landed at Brisbane using 50 degree flaps, rather than proceeding to Sydney when he did not have sufficient fuel to make a safe approach and landing. As is clear from our previous discussion, we do not find all of the law judge's findings underlying this conclusion adequately supported in the record. Furthermore, we are not convinced that the record supports a finding that respondent violated § 537(f) in failing to land at Brisbane. The pilot-in-command has overall and ultimate safety responsibility. With this comes the obligation to act responsibly and with all due care. Respondent was concerned, even before the flight began, that weather in Brisbane would complicate landing.[21] Arrow Air denied his request to use as an alternate airport an Air Force field adjacent to Brisbane, instead of Sydney.

It had rained at Brisbane airport prior to the flight's arrival. Although the tower reported there was no standing

[21]Respondent had been a pilot-in-command for 15 years. Tr. at 294.

water, respondent would have had to perform a 50 degree flaps landing. He chose not to.[22] We would not sanction respondent for exercising this degree of caution in deciding not to risk a Brisbane landing in these circumstances.[23] And, although the question is not resolved, there is support in the record that respondent's landing at Williamstown, rather than Sydney, was ultimately safer, as it is a more remote location than the Sydney

[22]Respondent testified that he chose not to because the runway was wet, Arrow Air denied his request for a runway analysis for a 50 degree flaps landing at Brisbane, he would not undertake such a landing without that analysis, and his past experience with hydroplaning convinced him to execute a missed approach. The Administrator (Reply at 24) cites certain testimony (Tr. at 219) that respondent actually received 50 degree flaps information for Brisbane over the phone before takeoff.

The law judge did not make a finding on this point, and we need not. Even if it were true, we are not convinced that it should affect the analysis. Given our other findings, especially that respondent did not violate § 121.645(b), the fact that he chose not to land at Brisbane with 50 degree flaps can not be found to be a careless or reckless act.

[23]Respondent claims that, if he had made a 50 degree flaps landing at Brisbane without the runway analysis and an accident had occurred due to water on the runway or some other reason, he likely would have been prosecuted for landing without the necessary runway analysis.

Notwithstanding our earlier comment regarding this matter, we note that the evidence in the record regarding respondent's ability, with information in the aircraft, to complete his own runway analysis, is confusing at best, and not evidence on which we would wish to rely. See Tr. at 81-82 and 95-97, 101. First Officer Taylor testified first that respondent should have known about a 50 degree flaps runway analysis, and testified later that respondent could not have known how to make one here or that one could be safely made.

airport. Tr. at 314.[24]

Nevertheless, a finding that respondent was careless is warranted due to our affirmance of the law judge's finding that respondent violated § 121.597(b). Respondent, as pilot-in-command is held to a standard requiring that he exercise the highest possible degree of care, and he failed to do so. Operating an aircraft 5,000 lbs. over its authorized payload can be extremely dangerous.

The issue of sanction remains. We do not believe that, in the circumstances, revocation of respondent's ATP is either required or warranted. We think an appropriate sanction would be a 60-day suspension of respondent's ATP.[25]

[24]Contradictory evidence was that he was directed to land at Williamstown, not Sydney. In any case, respondent did complete an uneventful landing at Williamstown. Although he did so with 50 degree flaps, and without a runway analysis, that was the safer course at the time, given his fuel reserves.

[25]Compare Administrator v. Kingfisher Air Service, 5 NTSB 945 (1986) (ATP revoked for operating four overweight flights within days of a 5-day suspension for an identical violation); Administrator v. Suburban Airservice, 3 NTSB 1860 (1975) (90-day suspension; aircraft exceeded maximum weight and crashed shortly after takeoff, pilot's training incomplete and without flight check, cargo (which included radioactive materials) not properly tied down); and Administrator v. Metro Air System, 2 NTSB 22 (1973) (120-day suspension; aircraft exceeded maximum allowable takeoff weight, was loaded so as to exceed maximum allowable aft center of gravity, and no alternate airport listed on the flight plan).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted in part and denied in part, as set forth in this opinion;

2. The Administrator's order is modified as set forth herein; and

3. The 60-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.[26]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[26]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

APPENDIX

Section 121.597(b) reads:

> (b) No person may start a flight unless the pilot in command or the person authorized by the operator to exercise operational control over the flight has executed a flight release setting forth the conditions under which the flights will be conducted. The pilot in command may sign the flight release only when he and the person authorized by the operator to exercise operational control believe that the flight can be made with safety.

Section 121.645(b) reads:

> (b). . . [N]o person may release for flight or takeoff a turbine-engine powered airplane . . . unless, considering wind and other weather conditions expected, it has enough fuel -
>
> > (1) To fly to and land at the airport to which it is released;
> >
> > (2) After that, to fly for a period of 10 percent of the total time required to fly from the airport of departure to and land at, the airport to which it was released;
> >
> > (3) After that, to fly to and land at the most distant alternate airport specified in the flight release, if an alternate is required; and
> >
> > (4) After that, to fly for 30 minutes at holding speed at 1,500 feet above the alternate airport (or the destination airport if no alternate is required) under standard temperature conditions.

Section 121.537(f) reads:

> (f) No pilot may operate an aircraft, in a careless or reckless manner, so as to endanger life or property.

Section 61.151(b) reads:

> To be eligible for an airline transport pilot certificate, a person must -
>
> (b) Be of good moral character.

Section 67.20(a)(1) reads:

> (a) No person may make or cause to be made -
>
> > (1) Any fraudulent or intentionally false statement on

any application for a medical certificate under this part.